United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7468

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GAYLE MCQUOID HOLLEY, individually and on behalf of JAMES MCQUOID, NORMAN MCQUOID, THOMAS MCQUOID, DOUGLAS MCQUOID, MICHAEL MCQUOID, and ADELAINE MCQUOID, her minor children,

Plaintiff-Appellant,

-vs-

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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STATEMENT OF ISSUES PRESENTED

1. Where the plaintiff claims the illegal denial of welfare benefits which could total over $10,000.00 during the numbers of years during which plaintiff could be eligible, is the jurisdictional amount requirement of 28 U.S.C. §1331 satisfied?

The District Court held in the negative.

2. Are a county welfare commissioner and a state welfare commissioner, who enforce an allegedly unconstitutional state statute, within the scope of 42 U.S.C. §1983?

The District Court held in the negative.

3. Does a complaint alleging the denial of welfare benefits based on alienage assert a substantial constitutional question?

The District Court held in the negative.

STATEMENT OF THE CASE

In this action, the plaintiffs challenge the validity of Section 131-k of the New York State Social Services Law and the regulation of the New York State Department of Social Services promulgated thereunder, Section 349.3 of Title 18 of the New York Codes, Rules and Regulations. The statute and regulation, as enacted and applied by defendants, operate to deprive certain aliens residing in the United States under color of law, and their families, of their rights to public assistance under the New York State program of Aid to Dependent Children. Plaintiffs contend that the state law, as enacted and applied, is invalid because it is inconsistent with federal law and regulation, under which all aliens residing in the United under color of law may be eligible for public assistance. Further, the plaintiffs contend that the state law, as enacted and applied, violates rights secured to them by the Fourteenth Amendment to the United States Constitution.

The plaintiff Gayle Maquoid Holley is a citizen of Canada. She first entered the United States in 1954, as a temporary non-immigrant student (11). She has resided in the United States ever since. She is the mother of the six minor plaintiffs, citizens of the United States by birth. The United States Immigration and Naturalization Service, the federal agency with exclusive authority to regulate the admission and

residence of aliens in the United States, is fully informed regarding the plaintiff family's situation. The Service has determined that although plaintiff Gayle Holley is an illegal, deportable alien, she will be allowed to remain in the United States for humanitarian reasons, to prevent the separation of mother and children. This constitutes residence in the country "under color of law " (10).

In 1968, Plaintiff Gayle Holley began receiving public assistance under the New York State program of Aid to Dependent Children. In 1974, at the time this action arose, Ms. Holley was receiving a grant of Aid to Dependent Children for seven persons, her six children and herself as the responsible parent with whom they resided (12). The legislature then enacted Section 131-k of the New York State Social Services Law, providing that every alien "unlawfully residing in the United States" is ineligible for public assistance.[1] In applying the new law to

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1 Section 131-k, entitled "Illegal Aliens", provides:

1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance, except for a temporary period for thirty days in accordance with subdivision two of this section.

2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because

(Footnote 1 continued on page 4).

the plaintiff family, the defendants determined the mother to be ineligible for public assistance and so reduced the family grant by one-seventh, the share allocated to meet the needs of the mother (12).

It is the reduction of the plaintiff family's grant of Aid to Dependent Children, and the state law mandating the reduction, that plaintiffs challenge. Plaintiffs commenced this action on April 17, 1975, at which time Judge Burke issued an Order to Show Cause relating to plaintiffs' motion for preliminary relief (3). Defendants moved to dismiss the Complaint (24,27).

Judge Burke granted defense motions dismissing the complaint (44) on the grounds that the defendant welfare commissioners were "not within the scope of [42 U.S.C.] Section 1983" (46), that there was no substantial constitutional claim asserted and that there had been no showing that the controversy involved $10,000.00 exclusive of interest and costs (46).

Then plaintiffs filed their appeal on August 4, 1975 (48).

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he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall, nevertheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed thirty days from the date of such determination in order to allow time for the referral of the cases to the United States immigration and naturalization service, or nearest the consulate of the country of the applicant or the recipient, and for such service or consulate to take appropriate action or furnish assistance.

ARGUMENT

POINT I

THE DISTRICT COURT HAD JURISDICTION TO HEAR AND DETERMINE PLAINTIFFS' CLAIMS

A. Federal Question Jurisdiction.

Plaintiffs assert that 28 U.S.C. §1331 gives the District Court jurisdiction to entertain plaintiffs' claims that they are being denied rights secured by the Constitution and laws of the United States. Section 1331 provides in pertinent part:

> "the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Plaintiffs allege that defendants are denying them rights secured by the equal protection clause, the Civil Rights Act of 1871, 42 U.S.C. §1983, the Social Security Act, 42 U.S.C. §301 et. seq., and regulations issued by the United States Department of Health, Education and Welfare. These claims satisfy the "arising under" requirement of Section 1331 in that they are founded directly upon federal law. See Gully v. First

National Bank, 299 U.S. 109 (1936); Wright, Federal Courts §17 (2d ed. 1970).

In addition, the plaintiffs have placed the requisite jurisdictional amount in controversy. The amount here in controversy is the sum of the public assistance benefits lost to the plaintiff family as a result of the operation of §131-k of the New York State Social Services Law. The operation of the statute results in a reduction in the plaintiffs' grant of Aid to Dependent Children of $92 per month, beginning January 15, 1975. The loss must be measured over the period of time during which it will be suffered. Since the plaintiff family could receive public assistance until the eighteenth birthday of the youngest child, a period of more than seventeen years, the amount in controversy totals more than $18,000.

Analogous cases indicate that the periodic (monthly) loss to plaintiff, measured over the maximum period of time during which the loss may occur, is properly designated the amount in controversy. In McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973); Anderson v. Denny, 365 F. Supp. 1254 (W.D. Va. 1973); and Joy v. Daniels, 479 F. 2d 1236 (4th Cir. 1972), the damages claimed were losses in rental savings resulting from the eviction of plaintiffs from low income housing. The courts computed the amount in controversy by measuring monthly rental savings lost over the life expectancy of the tenant plaintiffs, the period during which the loss could occur.

Other cases in which the jurisdictional amount has been computed by considering the economic harm to plaintiffs over a period of future time involve workmen's compensation, Aetna Casualty and Surety Co. v. Flowers, 330 U.S. 464 (1947); statutory maintenance similar to alimony, Thompson v. Thompson, 226 U.S. 551 (1912); and a contract providing for a life pension, Brotherhood of Locomotive Firemen and Enginemen v. Pinkston, 293 U.S. 96 (1934). The jurisdictional amount is present in such cases, and in the instant case, because a judgment for plaintiffs creates an obligation to pay over the years a sum in excess of the statutory amount. The fact that future events may alter or cut off the obligation is irrelevant in this action, as it was in the above cited cases, to a computation of the amount placed in controversy at the time of litigation.

Plaintiffs thus satisfy both the federal question prerequisite, and the jurisdictional amount prerequisite, of 28 U.S.C. §1331. This court therefore has jurisdiction to hear the plaintiff's claims under that provision.

B. Civil Rights Jurisdiction

This court also has jurisdiction, pursuant to 28 U.S.C. §1343(3), to hear plaintiffs' claims that they are unlawfully being denied public assistance benefits under the New York State program of Aid to Dependent Children. Section 1343(3) provides

that federal district courts shall have original jurisdiction of any civil action authorized by law to be commenced

> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States ...." 28 U.S.C. §1343(3).

As this Court has recently noted,[2] §1343(3) is the "jurisdictional counterpart" of the Civil Rights Act of 1871, 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress.

Here, plaintiffs have alleged that defendants, acting under color of state law, have deprived them of rights secured

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2 Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission, 490 F. 2d 387, 390 (2d Cir. 1973).

by the Fourteenth Amendment to the Constitution of the United States. It is alleged that Section 131-k of the New York State Social Services Law, as enacted and applied by defendants, operates to exclude a class of aliens residing in the United States under color of law from public assistance benefits, thus denying them protections guaranteed to all persons by the Fourteenth Amendment. In these circumstances, plaintiffs have stated a cause of action under the Civil Rights Act, 42 U.S.C. §1983, which this court has jurisdiction to hear pursuant to 28 U.S.C. §1343(3).

In addition to their constitutional claim,[3] plaintiffs allege two so-called "statutory" claims: that the challenged state law conflicts with federal law and with federal regulations. Once jurisdiction over the constitutional claim is established under §1343(3), then jurisdiction over the related statutory claims follows, under the doctrine of pendent jurisdiction. As stated recently by the Supreme Court in Hagans v. Lavine, 415 U.S. 528 (1974):

> Section 1343(3) therefore conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to

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3 Regarding the substantiality of plaintiffs' constitutional claim, see discussion at Point III, infra.

> support federal jurisdiction. If it was, it is also clear that the District Court could hear as a matter of pendent jurisdiction the claim of conflict between federal and state law, without determining that the latter claim in its own right was encompassed within §1343. Rosado v. Wyman, supra, 397 U.S. at 402-405, 90 S.Ct., at 1212-1214; see also N.Y. Dept. of Social Services v. Dublino, 413 U.S. 405, 412 n. 11, 93 S.Ct. 2507, 2512, 37 L.Ed.2d 688 (1973).

It is well established that the federal district courts have jurisdiction under 28 U.S.C. §1343 to hear constitutional claims arising under §1983, and also pendent statutory claims, in cases challenging state public assistance statutes and regulations. See, e.g. King v. Smith, 392 U.S. 309 (1968); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972); Hagans v. Lavine, supra. Accordingly, plaintiffs contend that the district court had jurisdiction under §1343(3) to hear plaintiffs' constitutional and statutory challenges to §131-k of the New York State Social Services Law.

POINT II

PLAINTIFFS' COMPLAINT STATED A CLAIM FOR WHICH RELIEF COULD BE GRANTED BASED ON A CONFLICT BETWEEN THE STATE STATUTE AND FEDERAL LAW

A. Section 131-k of the New York State Social Services Law is invalid because it is inconsistent with federal law.

It is well established that whenever state law conflicts with federal law, the former must yield to the supremacy of the latter. Hamm v. City of Rock Hill, 379 U.S. 306 (1964). This general principle has special meaning within the context of the federally created categorical public assistance programs, such as Aid to Families with Dependent Children (ADC), which operate on the principle of cooperative federalism.

The ADC program is created by Congress in the Social Security Act, 42 U.S.C. §601 et. seq. The Department of Health, Education and Welfare issues regulations implementing the legislative provisions. States that choose to participate in the program, and receive the available federal funds, must submit to the Department of Health, Education and Welfare a plan for the state ADC program that conforms with the provisions of the Social Security Act and federal regulations. The New York legislature has created a state plan for ADC in Title 10 of

Article 5 of the New York State Social Services Law. Regulations of the New York State Department of Social Services in Title 18 of the New York Codes, Rules and Regulations implement the plan.

In cases where a state plan is inconsistent with the controlling federal law and regulations, in that the state plan excludes from eligibility for public assistance persons eligible under the federal provisions, the courts have consistently struck down the state provisions. See e.g. King v. Smith, 392 U.S. 309 (1968); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972).

In this case, the relevant provisions of the Social Security Act are 42 U.S.C. §§601, 602 and 606. Section 601 sets forth the intended goals of the program.

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children (emphasis added). 42 U.S.C. §601.

Section 602 (a)(10) mandates the provision of aid.

> A State plan for aid and services to needy families with children must... provide... that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals. 42 U.S.C. §602(a)(10).

Section 606 (b)(1) defines the critical phrase in the following terms:

> The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living....(emphasis added). 42 U.S.C. §606 (b)(1).

There is no dispute as to the eligibility of the six minor plaintiffs. The issue in this case in whether aid will be provided by the defendants for the parent, plaintiff Gayle Holley, with whom the children reside. Congress has determined that the purpose of the ADC program, the care of needy children, can be accomplished only if the needs of a responsible adult are provided for by the program.[4] Pursuant to Section 131-k of the New York State Social Services Law, however, aid for Ms. Holley is not

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4 For a brief discussion of the legislative history indicating this concern, see Shirley v. Lavine, 365 F. Supp. 818, 822 (N.D.N.Y. 1973)(three-judge court), aff'd 95 S. Ct. 1190 (1975).

available under the New York State plan for ADC. Section 131-k is thus in direct conflict with the controlling federal law and is invalid.

B. Section 131-k of the New York State Social Services Law is invalid because it is inconsistent with federal regulations

Just as the state laws and regulations establishing the state program of Aid to Dependent Children (ADC) must be consistent with the provisions of the Social Security Act, so too the state provisions must be consistent with the regulations of the Department of Health, Education and Welfare implementing the federal law. The same principles of supremacy of federal law and cooperative federalism operate to invalidate a state law that conflicts with, and excludes from eligibility for public assistance persons eligible under, the federal regulations.

Title 45 C.F.R. §233.50, issued by the Department of Health Education and Welfare to be effective on January 2, 1974, spoke to the issue of the eligibility of aliens for public assistance. That regulation provides that public assistance shall be provided to persons otherwise eligible who are either (a) citizens; or (b) lawfully admitted permanent resident aliens; or (c) aliens "otherwise residing in the United States under color of law," including parolees and certain refugees.

The plaintiff Gayle Holley is not a citizen of the United States; nor is she a lawfully admitted permanent resident alien, as that term is defined by the Immigration and Naturalization Act. It is contended that Gayle Holley is an alien permanently residing in this country under color of law, as that term is used in 45 C.F.R. §233.50.

The term "under color of law" does not appear in the Immigration and Naturalization Act. It is the creature of the Department of Health, Education and Welfare, intended to extend the category of aliens eligible for public assistance beyond those lawfully admitted. To date, the courts have not interpreted the phrase "under color of law" as here applied.[5]

The regulation states that "under color of law" includes refugees conditionally admitted to the United States pursuant to Section 203(a)(7)[5a] of the Immigration and Naturalization Act, and parolees admitted to the United States pursuant to Section 212(d)(5)[5b] of the Immigration and Naturalization Act. The Handbook of Immigration Law and Procedure, by Charles Gordon and Harry

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5 In other contexts the phrase has been liberally construed to cover actions, by persons with purported authority, directly contrary to law. See United States v. Wiseman, 445 F.2d 792 (2nd Cir. 1971); Wall v. King, 206 F.2d 878 (1st Cir. 1953), cert. den. 346 U.S. 915 (1953).

5a 8 U.S.C. §1153(a)(7).

5b 8 U.S.C. §1182(d)(5).

N. Rosenfield (Matthew Bender, 1973) defines the parole status as follows:

> For many years the administrative authorities have been exercising an additional discretionary authority known as parole. This dispensation does not grant any legal residence status. However, it allows temporary harborage in this country for humane considerations or for reasons rooted in public interest. This is a device of wide flexibility. Among examples that can be cited are parole... to prevent inhuman separation of families. Pp. 2-48, 2-49.

Gayle Holley does not have the official status of parolee from the Immigration and Naturalization Service. Her situation is analogous to that of a parolee, that is, she has resided in the United States for twenty years with the knowledge of the immigration authority which, in its discretion, has consented to her continuing residence to avoid the inhumane separation of her family.

Section 233.50 states that the term "under color of law" includes, and therefore is not limited to,[6] conditional refugees and parolees. There are, then, other aliens, without official refugee or parolee status, who are in the United States "under color of law" for purposes of the regulations. Surely the aliens encompassed by that language are those who, like a parolee, are not "lawfully" residing in the country, but are permanently residing with the consent of the immigration authority. The

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6 Congress, in the Social Security Act, which 45 C.F.R. §233.50 seeks to implement, has stated that the term "includes", "shall not be deemed to exclude other things otherwise within the meaning of the term defined." 42 U.S.C. 1301 (b).

plaintiff Gayle Holley is such an alien.

The New York State legislature responded to the issuance of 45 C.F.R. §233.50, by enacting section 131-k of the New York State Social Services Law, effective June 7, 1974, which denies public assistance to all persons "unlawfully residing" in the country. The implementing administrative letter of the New York State Department of Social Services, 74 ADM-110, effective August 1, 1974, instructs the local agencies that applicants are eligible for public assistance only if they can p ove either (a) citizenship; or (b) status as a lawfully admitted permanent resident alien or (c) permanent residence under color of law, which is limited to persons admitted as parolees or conditional refugees. Under federal standards, the term "under color of law" includes, and is not limited to, parolees and refugees. Thus, excluded from eligibility based on residence "under color of law" in New York State are persons like plaintiff Gayle Holley, who are eligible for public assistance under the federal provisions.

Section 131-k, as enacted and applied by defendants, excludes from eligibility for public assistance the plaintiff Gayle Holley, who is eligible under federal law and federal regulation. The more restrictive state law is thus invalid, under the principles of supremacy and cooperative federalism enunciated in King v. Smith, supra, Townsend v. Swank, supra, and Carleson v. Remillard, supra.

Because plaintiffs have been deprived of rights and benefits accrued to them under the Social Security Act they have a claim for equitable and declaratory relief as provided in 42 U.S.C. §1983.

C. State and local officials acting under color of law are within the scope of 42 U.S.C. §1983

The Civil Rights Act of 1871 provided a federal remedy for persons deprived of federal rights by state officials acting in their official capacity. As presently codified at 42 U.S.C. §1983, the provision reads as follows:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

On this appeal the question is presented as to whether the defendant state and local welfare commissioners, acting as required by state law (New York Social Services Law, §131-k) come within the scope of §1983. The District Court, in finding that the plaintiff had stated no claim against the named defendants, sued in their official capacities, found Rosado v. Wyman, 414 F.2d 170 (2nd Cir. 1970), controlling.[7]

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7 This decision was subsequently overturned by the Supreme Court. See Rosado v. Wyman, 397 U.S. 397 (1970).

> The suit is an attack on a state statute and state regulation not on action taken under the statute and regulation. The complaint is against the state and County of Monroe, not against the Commissioner of the New York State Department of Social Services as an individual, nor against the Commissioner of the Monroe County Department of Social Services as an individual. Neither the state Commissioner nor the county commissioner are within the scope of Section 1983. Rosado v. Wyman, 414 F.2d. 170, 178. (45,46)

The Supreme Court has often spoken to the varying kinds and degrees of liability of public officials with regard to actions taken under color of law. Since its decision in Ex parte Young, 209 U.S. 123 (1908), the Court has repeatedly found that suits against state officials seeking, on federal constitutional grounds, to enjoin prospectively the enforcement of state statutes are not suits against the state for Eleventh Amendment purposes. So, in Truax v. Raich, 239 U.S. 33 (1915), where an alien sued the Attorney General of Arizona and the County Attorney of Cochise County to enjoin the enforcement of state anti-alien labor laws, the Court held:

> As the bill is framed upon the theory that the act is unconstitutional, and that the defendants who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainants' injury ..., it is established that the suit

cannot be regarded as one against the state. 239 U.S. at 37.

See also Edelman v. Jordan, 415 U.S. 651 (1974); Scheuer v. Rhodes, 416 U.S.232(1974); Erdman v. Stevens, 458 F.2d 1025 (2nd Cir. 1972), cert. den. 409 U.S. 889 (1972); Calo v. Paine, N.Y.L.J. 9/5/75, p.1 col. 6 (2nd Cir. August 18, 1975).

The most commonly used mechanism for challenging the actions of state officials acting pursuant to allegedly unconstitutional[8] state statutes has been an action asserting individual rights under 42 U.S.C. §1983. In cases involving the alleged conflict between state statutes and either federal law or the federal constitution, actions brought against state welfare officials, acting in their official capacities, have resulted in prospective declaratory and injunctive relief. See Graham v. Richardson, 403 U.S. 365 (1971); Rosado v. Wyman, 397 U.S. 397 (1970); Shirley v. Lavine, 95 S. Ct. 1190 (1975); Cordova v. Reed, Slip Op. 5463 (2nd Cir. August 7, 1975). In Edelman v. Jordan, supra, the Court again specifically endorsed this procedure.

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8 The unconstitutionality of state statutes may derive from a direct conflict with the Constitution of the United States of America, or indirectly, from a conflict with federal statutes and regulations, under the supremacy clause. Cf. Hagans v. Lavine, 415 U.S. 528 (1974).

> It is of course true that Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed. 2d 442 (1970), held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act. 415 U.S. at 675.

The Congress has also recognized the suitability of challenging the constitutionality of state statutes by suing the state officials charged with their enforcement. Section 2281 of Title 28, United States Code, provides for the issuance of interlocutory and permanent injunctions "restraining the action of any officer of such State in the enforcement or execution of [a] statute ... upon the ground of the unconstitutionality of such statute" by a district court of three judges. Cf. 28 U.S.C. §2284.

In the present case the New York State legislature has enacted a statute which plaintiff alleges to be contrary to the provisions of the Social Security Act of 1935, as amended, and to deprive her and her children of rights secured by the equal protection clause of the Fourteenth Amendment to the United States Constitution. Defendants are public officials charged with enforcing the allegedly invalid statutory provision[9] and are

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9 See New York Social Services Law, §§34 and 65.

thereby depriving plaintiff, " under color of any statute ... of any State," of rights "secured by the Constitution and laws" of the United States. 42 U.S.C. §1983. Defendants are not only proper parties, but the only parties that may be sued to enjoin this prohibited activity.

POINT III

A SUBSTANTIAL CONSTITUTIONAL CLAIM IS PRESENTED, REQUIRING THE CONVENING OF A DISTRICT COURT OF THREE JUDGES

The plaintiff seeks to enjoin the enforcement and operation of a state statute, section 131-k of the New York Social Services Law, which renders ineligible for public assistance any "alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States," on the grounds that it operates to deny to the plaintiff and her six minor children rights secured by the equal protection clause of the Fourteenth Amendment to the United States Constitution. Accordingly a district court of three judges should be impaneled to hear and determine the case pursuant to 28 U.S.C. 2281, unless the constitutional claims are wholly "insubstantial." Goosby v. Osser, 409 U.S. 512, 518 (1973); Maggett v. Norton, Slip Op.4537 at 4542 (2nd Cir. June 30, 1975); Cordova v. Reed, Slip Op. 5463 at 5467 (2nd Cir. August 7, 1975).

The determination of whether the claim is so insubstantial that a three-judge need not be convened is one which a district court will rarely find difficult under the standards recently enunciated by the Supreme Court in Hagans v. Lavine, 415

U.S. 528 (1974). In that action other provisions of New York's A.F.D.C. plan were challenged on equal protection grounds. The Court held that a three-judge court was necessary unless the constitutional claims were "essentially fictitious" or "obviously frivolous." 415 U.S. at 537. The basic criterion is whether "previous decisions of [the Supreme Court]... foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Id.at 537. See also Rosenthal v. Board of Education, 497 F. 2d 726 (2nd Cir. 1974); Cordova v. Reed, supra.

Plaintiff Holley brings to this Court equal protection claims on her own behalf[10] and on behalf of her six minor children.[11] The claims of both plaintiff Holley and of her children arise because of the distinction made by the challenged statute between "lawfully residents of the United States" (New York Social Services Law, §131-k) and residents not lawfully admitted but who are not to be deported "for humanitarian reasons,[12] regarding eligibility for public assistance benefits.

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10 Plaintiff Holley is a Canadian citizen without resident alien status currently residing in New York State (11).

11 Plaintiff Holley's six minor children are all natural born citizens of the United States (10).

12 The position of the United States Department of Justice, Immigration and Naturalization Service with regard to plaintiffs' status is that "although Mrs. McQuoid [Holley] is illegally in the United States, deportation proceedings have not been instituted against her for humanitarian reasons relating to her six United States citizen children " (19).

With regard to plaintiff Holley there is presented the initial question as to whether an alien not lawfully residing in the United States is a "person" for the purposes of the Fourteenth Amendment. That lawfully admitted resident aliens are protected by the equal protection clause has long been settled law. See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Truax v . Raich, supra; Takahashi v. Fish & Game Commission, 334 U.S. 410, 420 (1948). It is also clear that states may not deny public assistance to resident aliens or impose greater requirements upon their eligibility. Graham v. Richardson, 403 U.S. 365 (1971).

The application of the equal protection clause to illegal aliens has not been directly addressed by the Supreme Court [13] but several courts have held that there is no rational basis to distinguish between citizens and non-resident aliens. See Williams v. Williams, 328 F. Supp. 1381 (D.V.I.1971); Sailer v. Tonkin, 356 F. Supp. 72 (D.V.I. 1973). See also United States v. Winter, 509 F.2d 975, 989 n. 45 (5th Cir. 1975).

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13 The Court has drawn a distinction between aliens seeking admission and those lawfully admitted. See Bridges v. Wixon, 326 U.S. 135, 161 (1945) (concurring opinion of Mr. Justice Murphy); and Hellenic Lines Limited v. Rhoditis, 398 U.S. 308, 309 (1970).

The Fourteenth Amendment provides proscriptions on state action both with regard to "citizens" (privileges and immunities clause)[14] and to "persons" in general (equal protection and due process clauses). Having made these distinctions between all persons and persons who are citizens the amendment does not further restrict the application of the equal protection clause. There exists no reason to assume that the term "person" was intended to exclude all aliens (cf. Graham v. Richardson, supra) or any particular class of aliens (cf. Williams v. Williams, supra, at 1383).

Regardless of this initial concern with regard to plaintiff Holley's protections under the equal protection clause, it is clear that her six minor children have stated equal protection claims sufficiently substantial to require the convening of a three-judge court.

Until June 7, 1974, the State of New York followed a policy of providing for the needs of one or more of the parents of all "dependent children" where such children were eligible to receive an A.F.D.C. grant. New York Social Services Law §350.1 (a) continues to provide, in pertinent part, as follows:

> Allowances shall provide for the support, maintenance and needs of one or both parents if in need, and in the home....

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14 It is no answer to say that public assistance is a "privilege" instead of a "right". See Graham v.Richardson, supra, at 374, and Goldberg v. Kelly, 397 U.S. 254,260 (1970).

15 Such a provision for the caretaker's needs is required by 42 U.S.C. §606(b)(1). See Lopez v. Vowell, 471 F.2d 690, 694 (5th Cir. 1973), cert. den. 411 U.S. 939 (1973).

Through this section needy children are protected from having to support needy parents on their own A.F.D.C. grant. The inter-dependency of needy children and their caretaker parents has long been recognized by Congress[16] and by the courts. In Shirley v. Lavine, 365 F. Supp. 818 (N.D.N.Y. 1973)(three-judge court), aff'd 95 S. Ct. 1190 (1975), New York had enacted a provision requiring the deletion from a family A.F.D.C. grant of a mother who refused to cooperate in paternity proceedings. The court considered the impact of such action on the children.

> To argue, as the state does here, that it is only the non-cooperating mother who is penalized and not the innocent child or children [footnote omitted] is unrealistic. This distinction has been consistently rejected by the court. [Footnote omitted] 365 F. Supp. at 822.

See also Doe v. Gillman, 479 F.2d 646, 648 (8th cir. 1973); Lopez v. Vowell, supra; Woods v. Miller, 318 F. Supp. 510 (W.D. Pa. 1970) (three-judge court); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1973).

The enactment of New York Social Services Law §131-k, then, deprived not only plaintiff Holley of direct support, but deprived her children of the collateral support which both the state and federal A.F.D.C. provisions had previously guaranteed.

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16 See footnote 4, supra.

Because of the reduction of the family grant[17] by $92, plaintiff Holley's children have been deprived of benefits because their mother is not a lawful resident of the United States.

New York has created two classes of dependent children under its A.F.D.C. state plan: (1) those children residing with a parent who is a legal resident of the United States; and (2) those children residing with a parent who is not a legal resident of the United States. The first group is provided additional A.F.D.C. benefits to provide for the needs of the caretaker-parent, while the second group is not provided such aid. In order to survive plaintiff's attack on this classification on constitutional grounds the state must, under Graham v. Richardson, supra, show some compelling state interest to support this difference in treatment, inasmuch as it is based on alienage.[18] The Court in Graham found the "special public-interest" doctrine unpersuasive as a reason for restricting the availability of public assistance to certain groups of aliens.

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17 There has been no allegation that additional funds are available to make up the deficit created by this reduction.

18 403 U.S. at 371,372. In Graham the State of Arizona differentiated between aliens in residence for more than fifteen years and those in residence for a lesser period.

> Since an alien as well as a citizen is a "person" for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in Shapiro [cf. Shapiro v. Thompson, 394 U.S. 618 (1969)]. 403 U.S. at 375.

Plaintiff asserts that there is no state interest served by this classification, other than conservation of the public fisc, and any public interest with regard to the presence of illegal aliens is adequately protected by the federal government and not a state concern. See Williams v. Williams, supra, at 1383. The question of the state's interest in excluding non-citizens from public assistance benefits was laid to rest in Graham v. Richardson, supra, and the question of the reduction of a family's A.F.D.C. grant for reasons unrelated to the needs of the family has been found substantial in the three-judge court context. See Hagans v. Lavine, 415 U.S. 528 (1974).

Accordingly plaintiff has raised an issue with regard to the constitutionality of §131-k which is sufficient both to confer jurisdiction under 28 U.S.C. §1343 and to require the convening of a three-judge district court under 28 U.S.C. §§2281 ff.

POINT IV

THE DISTRICT COURT SHOULD HAVE GRANTED PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

Section 131-k of the New York State Social Services Law became effective in June of 1974. As applied to the plaintiff family, the statute renders the mother Gayle McQuoid Holley ineligible for public assistance benefits.

As a result of the operation of Section 131-k, the grant of Aid to Dependent Children for the plaintiff family has been reduced in amount by one-seventh (the share allocated for the needs of Gayle Holley) since January 15, 1975, from $644.00 per month to $552.00. Plaintiffs moved below for an order enjoining defendant Reed from continuing this reduction of $92.00 per month during the pendency of this action.

As set forth in the affidavit of Gayle McQuoid Holley attached to the complaint in this action (5, 6) , the reduction of the monthly grant of aid for the seven plaintiffs, to the level of assistance for a family of six, creates a situation of grave economic hardship for the family. The fixed expenses of the seven plaintiffs for shelter and utilities amount to $287.00 per month. The remainder of the reduced monthly grant is $265.00, or approximately $1.25 per person per day. Out of this amount plaintiffs must purchase food, clothing, personal items, and all

of the necessities of life other than shelter and utilities. It is impossible to provide all of the necessities of life for the seven plaintiffs out of the reduced grant.

Harm will thus result to the plaintiffs, because they will be deprived of the necessities of life during the pendency of this action, unless interlocutory relief is granted. The harm will be irreparable since no future income even if recoverable against the county,[19] will ever compensate plaintiffs for the deprivation of food and clothing endured during the interlocutory period during which relief has been denied.

The impact of a grant of preliminary relief upon the defendants would be slight. Ninety-two dollars per month is a tiny fraction of the total public assistance budgets administered by defendants. Weighed against this minimal effect upon defendants is the shattering impact of the $92.00 per month reduction upon plaintiffs. The amount is one-seventh of their total monthly income, and is necessary for their sustenance. A balancing of the hardships overwhelmingly favors the plaintiff and preliminary relief should issue.[20]

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19 Cf. Edelman v. Jordan, 415 U.S. 651 (1974).

20 See Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2nd Cir. 1973); Aguayo v. Richardson, 473 F.2d 1090 (2nd Cir. 1973).

The public interest also favors the granting of interlocutory relief in this case. Article XVII, Section I of the New York State Constitution states that assistance for the needy is a public concern. The issue involved in a request for preliminary relief under these circumstances should be whether the needs of the plaintiff family should be met in full, pending a resolution of the merits of the case. Clearly the public interest, as expressed in the State Constitution, requires the issuance of preliminary relief.

The plaintiffs have met three of the "classic criteria" for the granting of interlocutory relief. They have shown that irreparable damage will occur to the plaintiffs, that the balance of hardships favors them, and that the public interest would be served by granting immediate relief. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir. 1969); Clairol, Inc. v. Gillette Co, 389 F. 2d 264 (2d Cir. 1966); Hamilton Watch Co.v. Benrus Watch Co., 206 F.2d 738 (2nd Cir. 1973).

The final criterion under all of these cases is, of course, that the plaintiffs demonstrate a probability of success on the merits. As is demonstrated in Points II and III, supra, the plaintiffs have more than met that burden on the constitutional and statutory claims raised here.[21]

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21 The fact that the injury to the plaintiffs is based on a deprivation of constitutional rights is itself irreparable injury, over and above the very practical injury the plaintiffs will suffer unless interlocutory relief is granted. See Henry v. Greenville Airport Commission, 284 F.2d 631 (4th Cir. 1960); Battle v. Municipal Housing Authority, 53 F.R.D. 423,427 (S.D.N.Y. 1971).

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THIS MATTER REMANDED WITH INSTRUCTIONS

For the foregoing reasons the order of the district court dismissing the plaintiffs' complaint should be reversed and the matter remanded to the district court for further proceedings.

Because of the complexity of the procedural status of this case, involving a request for preliminary relief based on so-called "statutory claims" and, alternatively the convening of a three-judge district court to hear and determine plaintiffs' motion for a preliminary injunction based on the constitutional claims, plaintiffs' request that the remand include instructions. See Gumer v. Shearson, Hamill & Co., Inc., 516 F.2d 283 (2nd Cir. 1974). Plaintiffs believe appropriate instructions should require the following:

1. a timely determination of plaintiffs' request for a preliminary injunction based on the statutory claims (as set forth in sections VI,VII and IX);

2. should the single court deny plaintiffs' preliminary injunction motion, a request by the single judge that a three-judge court be convened to hear and determine plaintiffs' motion for a preliminary injunction based on the constitutional claim (as set forth in the complaint at section VIII); and

3. should the district court deny said motion, a timely determination as to whether a temporary restraining order should issue pending a three-judge court determination of plaintiffs' motion for a preliminary injunction.

In order to avoid the potential waste of judicial time and energy, plaintiffs suggest that this Court might give its view of the merits of plaintiffs' request for a preliminary injunction.

Respectfully submitted,

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Dated: Rochester, New York
September 24, 1975

CERTIFICATE OF SERVICE

I hereby certify that on this ~~24th~~ 25th day of September, 1975, I served the foregoing brief upon counsel for the appellees, Charles G. Porreca, Esq., 111 Westfall Road, Rochester, New York, 14620; and Alan Rubenstein, Assistant Attorney General of the State of New York, The Capitol, Albany, New York 12224; by causing copies (2) to be mailed, postage paid, to them.

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